80-417

NO.

Supreme Court, U.S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM A. ANDERSON,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

THEODORE S. WOROZBYT
Attorney for Petitioner
1414 Peachtree Cain Tower
Atlanta, Georgia 30043
(404) 658-1670

September 12, 1980

QUESTION PRESENTED

Where the State presented its case in chief and no evidence whatsoever was introduced or proferred that the petitioner had given any statement pre-arrest, incident to arrest, or post-arrest; and where the petitioner testified in his own behalf and acknowledged the transaction in question and pleaded entrapment; and where the State, upon cross-examination of Anderson, after asking Anderson whether he still contended that he was entrapped, attempted to impeach Anderson's exculpatory testimony by asking the question:

"Let me ask you this, you denied these transactions when Lt. Sanders arrested you... didn't you?",

and where there was no waiver by Anderson or his counsel; and where the State neither introduced nor profferred any evidence in rebuttal that Anderson had made any statement; did the Georgia Court of Appeals err in ruling that Anderson was not denied his constitutional rights of due process under Jackson v. Denno, 378 U.S. 368, Mincey v. Arizona, 437 U.S. 385,

and Doyle v. Ohio, 426 U.S. 610.

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REFERENCE TO OPINIONS BELOW

Anderson's conviction was affirmed by the Georgia Court of Appeals on February 15, 1980. Anderson's Motion for Rehearing in the Georgia Court of Appeals was denied, with opinion rewritten, on March 12, 1980. See Anderson v. The State, 153 Ga. App. 841.

Anderson filed a Petition for the Writ of Certiorari in the Georgia Supreme Court on March 31, 1980.

The Georgia Supreme Court denied Anderson's Petition on June 19, 1980 (unreported). Anderson filed a Motion for Reconsideration on June 27, 1980.

The Georgia Supreme Court denied Anderson's Motion for Reconsideration on July 15, 1980.

JURISDICTION

Anderson seeks review of the decision of the Court of Appeals rendered on February 15, 1980, opinion rewritten March 12, 1980, affirming his conviction in Richmond County, Georgia. Said opinion is reported in 153 Georgia Appeals 841.

Anderson's Petition for Certiorari filed in the Georgia Supreme Court was denied on June 19, 1980 (unreported).

Anderson's Motion for Reconsideration was denied on July 15, 1980 (unreported).

Anderson invokes jurisdiction of this Court under Title 28, United States Code, §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the Fifth Amendment to the United States Constitution, to wit:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The case also involves Section One of the Fourteenth Amendment to the United States Constitution, to wit:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural Posture.

On January 19, 1979, in the Richmond County Superior Court, Augusta Judicial Circuit, Georgia, the January Term, Indictment No. 33 was returned against William A. Anderson and Forrest M. Squires charging the Defendants on two counts with violation of the Georgia Controlled Substances Act in that the Defendants did, on the 11th day of January, 1979, and the 16th day of January, 1979, unlawfully sell marijuana, a controlled substance, to Johnnie Smith.

On May 1, 1979, a jury trial commenced as to the Defendant Anderson and a verdict of guilty was returned on both counts on May 3, 1979.

On May 9, 1979, in the Superior Court of Richmond County, Anderson was sentenced to five years to serve on each count to run concurrently to be followed by five years' probation on each count, to run concurrently.

An appeal bond in the amount of $10,000 was set and made.

On or about May 25, 1979, Anderson filed a Motion for a New Trial, which Motion was overruled on August 31, 1979. On or about September 26, 1979, Anderson filed a Notice of Appeal to the Georgia Court of Appeals.

The Court of Appeals affirmed on February 15, 1980, Case No. 59107.

Anderson filed his Motion for Rehearing on February 25, 1980, which was denied on March 12, 1980, with the opinion rewritten. See 153 Georgia Appeals 841.

The Georgia Supreme Court denied certiorari on June 19, 1980, and Anderson's Motion for Reconsideration on July 15, 1980.

FACTS

Pursuant to jury trial commenced on May 1, 1979, the State introduced the testimony of seven witnesses. (Note: References to transcript of said trial.) The testimony of experts Thiesen, Sheppo, and Aschkenasy is irrelevant to the subject appeal in that Anderson acknowledged the transactions in question.

Officer Myers' testimony (T. 103-123) is

also irrelevant in that Myers merely observed and monitored the transactions acknowledged by Anderson.

The testimony of the Smith brothers, Charles and John, who dealt face to face with Anderson pursuant to the sales of the marijuana in question, makes out the case against Anderson. Charles Smith's testimony (T. 28-80) denies that Smith enticed or entrapped Anderson.

The sixth witness called by the State, Police Office Lieutenant Sanders is relevant in that Sanders testified that he arrested Anderson pursuant to the subject charges, but gave no testimony or proffered none that Anderson had given any statement whatsoever, either pre-arrest, incident to arrest, or post-arrest. (T. 123-203).

The State's case in chief clearly made out a case of marijuana sales against Anderson. It must be emphasized that nowhere in the State's case in chief did they ever show or attempt to show that Anderson had made any statement of any kind, pre-arrest,

incident to arrest, or post-arrest, nor did the State attempt to make such a showing in rebuttal (T. 268, 269).

Anderson testified on direct examination that he was 43 years old, born and raised in Augusta, Georgia, and was honorably discharged from the United States Navy in 1956.

Anderson became involved in law enforcement in the fall of 1962 as a Deputy Sheriff for Richmond County. Anderson became involved in politics in 1971 and was elected in that year to the office of Sheriff. Anderson ran again in 1972 and was elected to a four-year term. Anderson ran again in 1976 and was defeated.

After Anderson was defeated in 1976, he went into business for himself full time in January, 1977. Anderson recalled having a conversation with Charles Smith sometime in the summer of 1978 concerning Charles Smith being fired by Sheriff Beck.

Occasionally Anderson would meet casually with Charles Smith at various locations in the Augusta area. Anderson would see Charlie

Smith casually at Bonnie & Clyde's and other locations. (T. 222, 223).

In the latter part of November or early part of December, Charlie Smith, pursuant to casual conversations that Smith had with Anderson, wanted to know whether Anderson know anybody who could make marijuana available to Charlie Smith. Charlie Smith had brought up the subject of marijuana and had made inquiries of Anderson concerning "how profitable it would be." (T. 224, 225).

At first Anderson shunted Charles Smith off believing that Smith was talking about small quantities of marijuana for Smith's personal use. Smith became more persistent and broached the topic of marijuana half a dozen to a dozen times during November-December, 1978. Finally Anderson, in an effort to "get rid of Mr. Smith" indicated to Smith that Anderson would be on the lookout for something. (T. 225, 226).

During this period of time, Anderson had developed a relationship with the co-Defendant in the subject case, one Forrest Squires. On

occasion, Squires and Anderson would frequent Bonnie & Clyde's.

During the first week of January, 1979, Charles Smith, having offered to back Anderson politically on prior occasions invited Anderson to "political meetings" that Smith was planning on having at his restaurant. Specifically, the purpose of these meetings was to generate political support for Anderson to run again for Sheriff.

Specifically, Smith invited Anderson to a particular meeting on or about January 4, 1979, said meeting to take place at Smith's restaurant. Smith further told Anderson that such political meetings would be held on the first Thursday of each month. (T. 230, 231).

Smith would link his communications with Anderson pertaining to marijuana with Smith's apparent concern that Anderson should run for Sheriff in that Smith was desirous of politically supporting Anderson. In connection with Smith's political communications with Anderson, Smith would link requests of Anderson that Anderson make a contact for Smith to purchase

marijuana. (T. 239-243).

Anderson did not attend the January 4 political "meeting" notwithstanding Smith's invitation to same. Smith, of course, was awaiting Anderson with his "body mike" operable for said January 4, 1979, "meeting".

Finally, on or about January 10, 1979, Anderson agreed to put Smith together with the co-Defendant Herbert Squires for the purchase by Smith of some marijuana from Squires. In consideration for Anderson's help to Smith aforementioned, Smith was to help Anderson politically. (T. 243).

The balance of Anderson's direct testimony (T. 244-248), Anderson acknowledges the communications which were recorded in the transactions pursuant thereto. Anderson again maintained that he was induced by Smith to broker the marijuana sale between Smith and Squires. Anderson testifies that Smith repeatedly approached Anderson and interrelated Smith's offer of political support for Anderson with Smith's requests that Anderson make a "contact" for Smith.

During the cross-examination of Anderson by the District Attorney (T. 249-261), Anderson reiterated his acknowledgement of the transaction in question and that he had been enticed and entrapped into said participation by the conduct and communications of Charles Smith.

At T. 261, the following crucial questioning took place, whereby Anderson under cross-examination was asked:

> "Q: You still say that you are the one who was being persuaded by Charles Smith?
>
> A: Yes, sir.
>
> Q: Let me ask you this, you denied these transactions when Lt. Sanders arrested you there in Forrest Squires' apartment, didn't you?"

At this point, counsel for Anderson moved for a mistrial on the doctrine of Doyle v. Ohio, 426 US 610, 49 L.Ed. 2d 91 and Jackson v. Denno, 378 U.S. 368, 12 L.Ed. 2d 908; that there had been no showing by the State in its

case in chief that any statement had or had not been made.

In response to Anderson's Motion for a Mistrial, the District Attorney Stated as follows:

> "Your Honor, in this particular case the question was asked, the statement was not made. In addition, the State expects the evidence to show that he did not try to assert his Fifth Amendment rights in any way, but merely told the Investigator Sanders, 'I didn't do it; there is nothing to this, it's all political.' That is totally inconsistent and not in response to interrogation so that Miranda would play any part in it. It is inconsistent with the position he has now taken under oath before this jury, and whether Miranda was involved -- and it is not because it is not in response to interrogation of any sort --

even if Miranda were involved under Harris v. New York, we are allowed to bring in the inconsistency there and that is all we are attempting to do, to show that his position in court today and what he said from the stand is inconsistent with the statement he made immediately upon his arrest, not in response to interrogation." (T. 262, 263).

After comments by Anderson's counsel, the Court stated as follows:

"Well, I overruled the Motion for a mistrial. I am going to instruct counsel not to pursue that line of interrogation any further and I am going to instruct the jury to disregard the question." (Emphasis supplied, T. 264).

After the jury returned to the jury box, the Court instructed the jury as follows:

"Ladies and Gentlemen of

the Jury, I instruct you to disregard any question asked the witness about the statement that he purportedly made to Investigator Sanders and any answer which he started to give and I instruct counsel not to pursue that line of questioning any further." (Emphasis supplied, T. 265).

Anderson renewed his motion for a mistrial to preclude waiver under Georgia law. (T. 265). The State did not attempt to introduce or proffer any evidence of any alleged statement by Anderson in rebuttal although it is clear that the trial court did not preclude such attempt.

Anderson pursued only one point through the State appeal process, the Doyle-Jackson deprivation. This issue is now before this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Georgia Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court in light of this Court's recent decision in Anderson v. Charles, _____ U.S. _____, 65 L.Ed. 2d 222, 100 S. Ct. _____ (June 16, 1980) and Jenkins v. Anderson, _____ U.S. _____, 65 L.Ed. 2d 86, 100 S. Ct. _____ (June 10, 1980).

B. The Georgia Court of Appeals in deciding against Anderson relied on the Georgia Supreme Court's decision in Scott v. State, 243 Georgia 233 (1979), which decision decides an important question of Federal law in conflict with this Court's decision in Mincey v. Arizona, 437 U.S. 385, 98 S.C. 2408, 57 L.Ed. 2d 290 (1978), see concurring opinion in Scott v. State, 243 Georgia 233, at 235.

C. The Georgia Court of Appeals has decided a Federal question in a way in direct conflict with the decision of the Fifth

Circuit Court of Appeals in Breedlove v. Beto, 404 F. 2d 1019 (1968).

ARGUMENT

A. THE GEORGIA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT IN LIGHT OF THIS COURT'S RECENT DECISION IN ANDERSON V. CHARLES, ____ U.S. _____, 65 L.Ed. 2d 222, 100 S. Ct. _____ (June 16, 1980) AND JENKINS V. ANDERSON, ____ U.S. ____, 65 L.Ed. 2d 86, 100 S. Ct. _____(June 10, 1980).

This Court has recently "straddled" Doyle v. Ohio, 426 U.S. 610 in the aforementioned cases.

In Jenkins, supra, the Court held that a prosecutor may impeach a testifying defendant with his pre-arrest silence.

In Anderson v. Charles, supra, this Court held that cross-examination of an accused at his murder trial in state court regarding inconsistencies between his direct testimony and the testimony of the police officer who arrested him did not violate due process. In Anderson, supra, the State presented its case in chief (see L.Ed. 2d at 224) via testimony by the arresting police officer that the defendant had been "interviewed shortly after his arrest".

The petitioner Anderson does not contest either Anderson v. Charles, supra, or Jenkins v. Anderson, supra.

Other than the State assuming a fact not in evidence, i.e. that Anderson had made a statement incident to his arrest, there was no showing or proffer that Anderson had made any statement whatsoever. Based on the silent record, this Court must indulge the presumption that Anderson did not waive his rights under Jackson v. Denno, 378 U.S. 368, or Miranda v. Arizona, 384 U.S. 436, or Doyle v. Ohio, 426 U.S. 610. In this regard, see Johnson v. Zerbst, 304 U.S. 458, Brookhart v. Janis, 384 U.S. 1, and Carnley v. Cochran 369 U.S. 506.

Therefore, we have here Anderson making no statement and the State "creating" an inconsistent impeaching statement via cross-examination.

When confronted with the improper question asked by the District Attorney, Anderson was left with the classical Hobson's choice.

He certainly should not have been compelled (whip-sawed) to deny that he denied the transactions in question, because such denial, per se, would accomplish what Anderson seeks to rectify, i.e. a focus upon his post-arrest silence.

The Georgia Court's decision imperils the right of each and every defendant to give exculpatory testimony when said defendant has exercised his rights to remain silent incident to his arrest.

For example, where a defendant has exercised his right to remain silent in a homicide prosecution and where the State introduces no evidence that the defendant gave any statement incident to his arrest and where the defendant testifies that he acted in self-defense, the State could, under this Georgia decision, cross-examine the defendant thusly: "But you denied shooting the victim when you were arrested, didn't you?".

It must be emphasized that such a question could be asked regardless of whether the denial was in fact made with "positive" con-

sequences to the probability of conviction. For if the defendant denies a denial, he focuses upon his silence, which constitutes a waiver of his rights under Doyle v. Ohio, supra. If the defendant does not deny the denial, he leaves the jury to infer that he did deny the transaction in question, thereby impeaching his trial testimony.

In this context, a fortiori, a "no statement" situation cannot stand on weaker constitutional ground than an "involuntary statement" situation. That is, if the State cannot introduce an involuntary statement for any purpose, Mincey v. Arizona, 437 U.S. 385, 397, does it not follow that the State ought not to be allowed to introduce a "statement" that wasn't made in fact (and must be presumed at law not to have been made) for impeachment purposes?

Thus, the Georgia decision under attack allows the State to do indirectly what it cannot do directly, i.e. cause the jury to draw impermissible inferences from the defen-

dant's silence, thereby, by circumvention, emasculating the vitality of Doyle v. Ohio, supra, and its progeny.

This Court has never dealt with a question of this nature. It ought to. The Georgia decision under attack, if allowed to stand, will permit Georgia prosecutors to "shotgun" their cross-examination, will chill every defendant's right to testify affirmatively in his defense when he has given no statement incident to his arrest, and will create substantial confusion of the meaning of this Court's decisions herein relied upon in the Georgia appellate system.

B. THE GEORGIA COURT OF APPEALS IN DECIDING AGAINST ANDERSON RELIED ON THE GEORGIA SUPREME COURT'S DECISION IN SCOTT V. STATE, 243 Georgia 233 (1979), WHICH DECISION DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH THIS COURT'S DECISION IN MINCEY V. ARIZONA, 437 U.S. 385, 98 S.C. 2408, 57 L.Ed. 2d 290 (1978), SEE CONCURRING OPINION IN SCOTT V. STATE, 243 Georgia 233, at 235.

The Georgia Supreme Court decision in Scott v. State, 243 Ga. 233, as manifested clearly by Justice Hill's concurring opinion, interprets Jackson v. Denno, 378 U.S. 368 to mean that an involuntary confession may be used for purposes of impeachment. This, of course, is in direct conflict with this Court's decision in Mincey v. Arizona, 437 U.S. 385, 397 (1978). The Georgia Court of Appeals, in affirming the petitioner Anderson's conviction relied on Scott v. State and the above erroneous interpretation.

Both the six to one majority in Scott, supra, and the Georgia Court of Appeals in affirming Anderson's conviction (153 Ga. App. 841) misapplied and misconstrued Harris v. New York, 401 U.S. 222.

It would seem clear that this Court ought to rectify the erroneous interpretations given this Court's decisions by the Georgia Supreme Court.

If the Georgia Supreme Court had correctly interpreted Mincey v. Arizona, 437 U.S. 385, they would not have held that "an involuntary confession may be used for purposes of impeachment" and the Georgia Court of Appeals would not have relied on such an erroneous principle in affirming the petitioner Anderson's conviction.

Thus, this Court should grant certiorari not only to avail Anderson of due process, but to correct serious misinterpretations of this Court's decisions which have been made by the highest Court of the State of Georgia.

C. THE GEORGIA COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN DIRECT CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IN BREEDLOVE V. BETO, 404 F. 2d 1019 (1968).

Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968) is strikingly in point to the subject case. In Breedlove, as in the instant case, the District Attorney sought to impeach a testifying defendant, through cross-examination, with a statement allegedly made by the testifying defendant which was inconsistent with the self-defense testimony.

In Breedlove, the testifying defendant acknowledged the conduct in question, i.e. causing the death of another, but affirmatively testified to the defense of self-defense. The District Attorney, in Breedlove, in violation of Jackson v. Denno, absent any offering that any statement had been given, attempted, pursuant to cross-examination, to show that Breedlove had made a statement incident to his arrest which statement was inconsistent with the self-defense testimony.

The Breedlove court rejected the argu-

ments made by the State in that case, which arguments are virtually identical to those arguments made by the State in this case by both the District Attorney at the trial level (T. 262, 263) and the rationale upon which the Georgia Court of Appeals affirmed Anderson's conviction. See Anderson v. The State, 153 Ga. App. 841.

Breedlove, supra, survives Harris v. New York, 401 U.S. 222, which case was misapplied and misconstrued by both the District Attorney at the trial level (T. 262) and the Georgia Court of Appeals, see Anderson v. The State, 153 Ga. App. 841.

APPENDIX

IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

THE STATE OF GEORGIA	*	
	*	#59107
VS.	*	
	*	153 GA. APP. 841
ANDERSON, WILLIAM	*	

BANKE, Judge.

The appellant, a former sheriff of Richmond County, appeals his convictions on two counts of selling marijuana. In the face of the overwhelming evidence introduced against him at trial, including tape recordings of his conversations with government informants, he admitted that he had arranged the sales and pled entrapment. On cross examination, the state attempted to impeach him in the following manner: "Let me ask you this, you denied these transactions when Lt. Sanders arrested you there in Forrest Squires' apartment, didn't you?" Defense counsel immediately objected and moved for a mistrial on the ground that the state had not previously sought to introduce evidence that the appellant made such a denial and thus had not given him an opportunity to seek a Jackson v. Denno

hearing to contest the voluntariness of the statement. The trial court denied the motion but instructed the state not to pursue the question and told the jury to disregard it. The state made no subsequent attempt to introduce evidence to substantiate its position that the defendant had denied guilt when arrested. The overruling of the motion for mistrial is the sole enumeration of error on appeal. Held:

Since the state asked the question for the purpose of impeaching the appellant's exculpatory entrapment testimony, no Jackson v. Denno hearing was required. See Scott v. State, 243 Ga. 233 (1) (253 SE2d 698)(1979). See also Harris v. New York, 401 U.S. 222 (91 SC 643, 28 LE2d 1)(1971). Cf. Perkins v. State, 152 Ga. App. 101, 103 (262 SE2d 158) (1979). The appellant further contends, however, that if he had been forced to answer the question, his response might have been that he had in fact remained silent upon his arrest and that the question therefore amounted to an impermissible comment on his

right to remain silent. See Doyle v. Ohio, 426 U.S. 610 (96 SC 2240, 49 LE2d 91)(1976). While it is fascinating to speculate on what the appellant's response might have been, the fact remains that he made no response. As indicated previously, his objection was sustained, and the jury was instructed to disregard the question. Accordingly, we do not find, in the face of the compelling body of evidence introduced against the appellant, that the trial court abused its discretion in denying his motion for mistrial.

Judgment affirmed. McMurray, P. J., concurs. Smith, J., concurs in the judgment only.

Argued January 15, 1980 - Decided February 15, 1980 - Rehearing denied March 12, 1980 - Cert. applied for.

Drug violation. Richmond Superior Court. Before Judge Fulcher.

Theodore S. Worozbyt, for appellant.

Richard E. Allen, District Attorney, James W. Purcell, Assistant District Attorney, for appellee.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA JUNE 19, 1980

Dear Sir:

Case No. 36230, Anderson v. The State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA 7/15/80

DEAR SIR:

The motion for a reconsideration was denied today:

Case No. 36230, Anderson v. The State

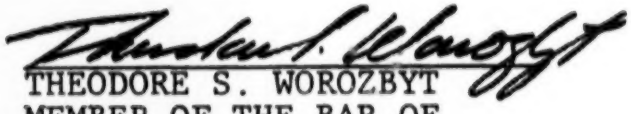
Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Petition for the Writ of Certiorari on Mr. Richard E. Allen, District Attorney, Augusta Judicial Circuit, Suite 500, 500 Building, Augusta, Georgia, 30902, by depositing said three (3) copies in a United States Post Office, with first-class postage prepaid, addressed to him at the above address.

This 11th day of September, 1980.

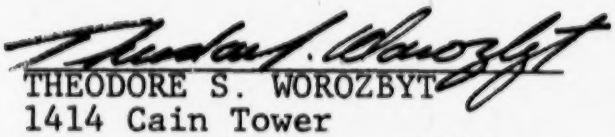


THEODORE S. WOROZBYT
MEMBER OF THE BAR OF
THIS COURT
ATTORNEY FOR PETITIONER
WILLIAM A. ANDERSON

1414 Peachtree Cain Tower
Atlanta, Georgia 30043

NOTICE OF ENTRY OF APPEARANCE

COMES NOW THEODORE S. WOROZBYT, a member of the Bar of this Court, and enters his appearance as counsel for the Petitioner William A. Anderson.



THEODORE S. WOROZBYT
1414 Cain Tower
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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether the Georgia court properly concluded that none of Petitioner's rights were violated by a question which was never answered relating to an alleged statement by the Petitioner.

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STATE OF GEORGIA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On January 19, 1979, Petitioner,

William A. Anderson, and Forrest M. Squires,

were indicted by the Superior Court of Richmond County, Georgia. Both defendants were charged with two counts of violation of the Georgia Controlled Substances Act in that they did unlawfully sell marijuana on two separate occasions to Johnny Smith. (R. 4).

Defendant Squires subsequently entered a plea of guilty to the charges. On May 1, 1979, Petitioner received a jury trial on both counts. The jury returned a verdict of guilty on both counts on May 3, 1979. Petitioner was sentenced on May 9, 1979, to ten years on each count to run concurrently, with the first five years of said sentences to be served in the Georgia prison system and the remaining five years to be served on probation. (R. 26).

Petitioner subsequently appealed his convictions to the Court of Appeals of Georgia. Petitioner's main allegation on appeal related to a question by the prosecution on cross examination of the Petitioner. Petitioner asserted that this question violated his rights under Doyle v. Ohio, 426 U.S. 610 (1976); Miranda v. Arizona, 384 U.S. 436 (1966); and Jackson v. Denno, 378 U.S. 368 (1964). The Georgia Court of Appeals determined that the trial court did not abuse its discretion in denying the Motion for Mistrial and that Petitioner's rights had not been violated. The court thus affirmed Petitioner's conviction on February 15, 1980. Anderson v. State, 153 Ga. App. 841, __ S.E.2d __ (1980).

Pursuant to Petitioner's Motion for Rehearing, the Court of Appeals rewrote its opinion, again affirming the conviction. The Supreme Court of Georgia denied the Petition for Certiorari on June 19, 1980. The Supreme Court of Georgia also denied Petitioner's Motion for Reconsideration on July 15, 1980.

Further facts will be developed as necessary for a more thorough consideration of the issue raised by the present petition.

PART TWO

REASON FOR NOT GRANTING THE WRIT

A. THE GEORGIA COURT OF APPEALS PROPERLY DETERMINED THAT THE PETITIONER'S CONSTITUTIONAL RIGHTS HAD NOT BEEN VIOLATED BY AN UNANSWERED QUESTION FROM THE PROSECUTION RELATING TO AN ALLEGED STATEMENT MADE BY THE PETITIONER.

At Petitioner's trial, the State presented evidence showing Petitioner's involvement in sales of marijuana on two separate occasions. The State's case was supported by various tape recordings made of conversations the Petitioner had with Charles Smith and John Smith. No evidence

was introduced by the State of any statement made by the Petitioner as the State had no reason to believe that Petitioner would admit to the tape recordings and then assert a defense of entrapment. Up until the time of Petitioner's taking the stand, any statements from the Petitioner denying his commission in the crimes would have had no probative value.

After the State concluded its case, the Petitioner took the stand and admitted being the individual on the tape recordings. He further admitted his participation in the transactions to a limited degree. The Petitioner asserted that he was entrapped by law enforcement officials in participating in the drug transactions. On cross-examination, the prosecution attempted to discredit

Petitioner's entrapment defense. The prosecution asked the following question: "Let me ask you this, you denied these transactions when Lieutenant Sanders arrested you there in Forrest Squires' apartment, didn't you?" (T. 261). Counsel for the Petitioner immediately objected before an answer was given. The jury was sent out and Petitioner's counsel moved for a mistrial based on Doyle v. Ohio and Jackson v. Denno. Petitioner's counsel specifically asked that the court grant a mistrial. (T. 262). In response to the objection, the prosecution stated as follows:

> "Your Honor, in this particular case, the question was asked, the statement was not made. In addition, the State expects

the evidence to show that he did not try to assert his Fifth Amendment rights in any way, but merely told the Investigator Sanders, 'I didn't do it; there's nothing to this, it's all political'. That is totally inconsistent and not in response to interrogation so that Miranda would play any part in it. It is inconsistent with the position he has now taken under oath before this jury whether Miranda was involved - and it is not because it is not in response to interrogation

of any sort - even if Miranda were involved under Harris v. New York we are allowed to bring that in even if Miranda were involved and the Miranda rights had not been given. Under Harris v. New York we are allowed to bring in the inconsistency there and that is all we are attempting to do, to show that his position in court today and what he said from the stand is inconsistent with the statement he made immediately upon his arrest, not in response to interrogation."

(T. 262-263). Counsel for the Petitioner

argued that this particular situation was distinguishable from Harris v. New York, 401 U.S. 222 (1971), cited by the prosecution. Petitioner's counsel then asserted that there had been no statement introduced into evidence and that if any such statement were going to be introduced, a Jackson v. Denno hearing would be required.

After listening to arguments by counsel, the trial court ruled as follows: "I overrule the motion for a mistrial. I am going to instruct counsel not to pursue that line of interrogation any further and I am going to instruct the jury to disregard the question." (T. 264). When the jury returned to the courtroom, the court instructed them as follows:

"Ladies and Gentlemen of the jury, I instruct you to disregard any question asked the witness about the statement that he purportedly made to Investigator Sanders and any answer which he started to give and I instruct counsel not to pursue that line of questioning any further."

(T. 265). Thus, no answer was ever given to the question, no statements were introduced that were allegedly made by the Petitioner and the jury was instructed to disregard any such line of questioning.

Petitioner raised this point as error in his brief to the Georgia Court of Appeals as well as in this Petition for

Certiorari to the Supreme Court of Georgia. The Court of Appeals of Georgia found that no Jackson v. Denno hearing was required as the question was asked solely for the purpose of impeaching the Petitioner's exculpatory entrapment testimony. Anderson, supra. The court further refused to speculate as to Petitioner's position had he been forced to answer the question. The court noted that no response had been made and the jury was adequately instructed to disregard the question. The court found that in face of the compelling evidence introduced against the Petitioner, there was no abuse in discretion in denying the Motion for Mistrial.

Petitioner now asserts in this court as error, the ruling of the trial court and

the Court of Appeals of Georgia. Petitioner asserts that the rulings by these courts deny his rights under Doyle v. Ohio, supra, apparently claiming that this somehow commented on Petitioner's assertion of his Fifth Amendment rights. Petitioner further asserts that the Georgia courts misapplied this court's holding in Harris v. New York, supra. Petitioner finally asserts that the Georgia Court of Appeals has issued an opinion in direct conflict with an opinion by the Fifth Circuit Court of Appeals in Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968).

Although Petitioner asserts these as three separate reasons for granting the writ as they are all interrelated, Respondent will consolidate the points made by the Petitioner in his argument.

The present petition presents an issue not readily comparable to the prior decisions of this Court. Petitioner has asserted numerous cases which he claims would support a finding of a violation of his constitutional rights by the previously quoted question from the prosecution. The focal point of the examination of the present case should be the actual question which was asked and the subsequent response of the trial court.

Petitioner asserts in various portions of his brief that this question amounted to either a comment on Petitioner's silence or the improper introduction of a statement made by the Petitioner without a Jackson v. Denno hearing. As Petitioner has admitted, there was no evidence presented before the jury to show the Petitioner either made a statement or remained silent. The only reference in the record to explain whether Petitioner made such a statement is the

offer of proof made by the prosecution to the trial court. The district attorney asserted that the Petitioner made a statement denying his involvement in the drug transactions. (T. 263). The Petitioner did not assert at that time that he made no statement, nor did he confirm that he had made a statement. The trial court specifically directed the prosecution "not to pursue that line of interrogation any further." (T. 264). Clearly, this instruction from the trial court precluded the prosecution from producing any evidence before the jury of any statement which the Petitioner may have made. The court further instructed the jury to disregard any reference to any alleged statements. Thus, no comment was made in response to the prosecution's question.

Respondent submits that this is clearly no violation of the principles of Doyle v. Ohio, supra, as asserted by the Petitioner. In Doyle, this Court ruled that post-arrest silence in the wake of Miranda warnings is ambiguous and cannot be used at trial to impeach an exculpatory story told by a defendant. The facts in the case at bar are virtually the opposite from the facts in Doyle. In his testimony at trial, Petitioner admitted taking part in the various transactions and admitted that his voice was on the tapes played for the jury. The Petitioner merely asserted a defense of entrapment. The prosecution did not attempt to show that Petitioner had not made any statement to the authorities, but was showing that Petitioner had taken an inconsistent position prior to trial. That is, the

prosecution attempted to show that the Petitioner denied any participation in the drug transactions. This is clearly distinguishable from a case of showing an individual's silence. Silence is not necessarily inconsistent with an exculpatory story when that silence comes in the wake of Miranda warnings. However, a statement denying participation in the crime is clearly inconsistent with a statement at trial admitting participation in the crime, but asserting a defense of entrapment. Thus, there was no ambiguity involved as there was in Doyle.

Petitioner asserts that this Court should presume that he did not waive his right to remain silent upon arrest. No such presumption is required in light of the offer of proof made by the prosecution at trial. Petitioner made no attempt to show the Court that he made no statement.

This offer could have been made outside the presence of the jury and would have shown the trial court that the prosecution's question was an improper comment on Petitioner's silence. This would have avoided the problem that Petitioner continually classifies as a "Hobson's choice". Furthermore, the actions of the trial court resolved Petitioner's problem by clearly instructing the jury that they were precluded from considering any statement or lack thereof.

Petitioner goes on to assert in his brief that even if this Court assumes that he did not remain silent, the Court should find a violation of his Miranda rights and his rights under Jackson v. Denno . Petitioner refers this Court to a Fifth Circuit Court of Appeals decision which

he asserts as appropriate in this case. See Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968). In Breedlove, the district attorney referred to a part of the Defendant's statement that was not in evidence. The court found that it had to determine whether the dialogue at trial was sufficient use of the Defendant's confession to invoke the principles in Jackson v. Denno. The court noted that the reason for the rule requiring a determination of the voluntariness of the confession is that a defendant should not be convicted on the basis of his own confession of guilt unless there is a prior determination by the court that the confession was voluntary. Breedlove, supra at 1022. The case at bar is clearly distinguishable as the statements attempted to be introduced by the prosecution did not

amount to a confession at all, but were clearly designed to be exculpatory. Furthermore, the statements made by the Petitioner were never presented to the jury for their consideration. The only comment before the jury was the initial question by the prosecution, and the jury was clearly instructed to disregard that question.

Petitioner has asserted that the Georgia Court of Appeals' reliance on Harris v. New York, 401 U.S. 222 (1971), is misplaced. It should be noted that Harris was decided after the Fifth Circuit's decision in Breedlove v. Beto, supra. In Harris, this Court determined that statements could be used for impeachment of a defendant even though the statements were inadmissible under Miranda v. Arizona. Petitioner asserts

that there is still a requirement of a voluntariness hearing under Jackson v. Denno and asserts that the Georgia courts have incorrectly interpreted this Court's decision in Mincey v. Arizona, 437 U.S. 385 (1978). The Georgia Supreme Court has followed this Court's decision in Mincey as recently as Jones v. State, 243 Ga. 826, __ S.E.2d __ (1979), in which the court determined that when using statements for impeachment purposes, a showing of voluntariness must be made. There has been no assertion by the Petitioner that any statements made by him were involuntary. Rather, Petitioner has attempted to assert that the question by the prosecution was a comment on his silence. If Petitioner would have this Court presume that Petitioner remained silent, then there could clearly be no requirement for a voluntariness hearing.

Respondent submits that this Court should specifically note the surrounding facts and circumstances of this particular case. The question by the prosecution was not directed at Petitioner's silence, but was rather an attempt to impeach Petitioner's entrapment defense. No statement by the Petitioner was ever introduced before the jury, but was shown in an offer of proof by the prosecution to the court. As no statement was presented to the jury, there is no requirement for a Jackson v. Denno hearing. As the prosecution offered to show that there were statements, there is clearly no comment on Petitioner's silence. The instructions by the trial court clearly corrected any error that may have occurred by the question of the prosecution. Respondent submits that

this court should at most find harmless error by the statement of the district attorney. Under the standard of Chapman v. California, 386 U.S. 18 (1967), this Court can easily find that the question by the prosecution did not in any way contribute to the Petitioner's conviction. In light of the various tape recordings and testimony presented at trial, there is clearly overwhelming evidence of Petitioner's guilt.[1]

Thus, Respondent asserts that there have been no violations of Petitioner's constitutional rights by the single question asked by the prosecution that was not answered by

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1/ Both the Fifth and Sixth Circuit Courts of Appeals have found harmless error in Doyle v. Ohio situations. See Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977) and Meeks v. Havener, 545 F.2d 9 (6th Cir. 1976), cert. denied 433 U.S. 911 (1977).

the defendant. In light of the instructions of the trial court, the prosecution did not err in not presenting the statements by other testimony. Thus, Respondent submits that there have been no violations of Petitioner's federal constitutional rights.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the Petition for a Writ of Certiorari filed on behalf of the Petitioner, William A. Anderson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three (3) copies of same in the United States Mail with proper address and adequate postage:

Mr. Theodore S. Worozbyt
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This 24 day of October, 1980.

JOHN C. WALDEN